IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 4

FEDERAL TRADE COMMISSION *et al.*,
Appellants,

against

CLAIRE FURNACE COMPANY, RELIANCE COKE COMPANY *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF FOR THE APPELLEES ON REARGUMENT.

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Preliminary Statement.

This case was brought to this Court by appeal from a decree of the Court of Appeals of the District of Columbia affirming a decision of the Supreme Court of the District. The latter Court found that the amended answer of the Federal Trade Commission (hereinafter referred to as the Commission) was defective in not stating a defense to the bill brought by the Appellees and, the Appellants having refused an opportunity further to amend their answer, the Court struck out the amended answer and granted an injunction restraining the Commission from taking steps to compel the Appellees to file the monthly reports demanded by the Commission's order.

This supplemental brief for the Appellees on reargument is filed for the double purpose of answering the Supplemental Brief filed on behalf of the Commission and of discussing the application to the present case of the law as laid down by this Court in two cases decided

since the original argument, viz., the *Tobacco Companies* case,

> *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298,

and the *Grain Companies* case,

> *Federal Trade Commission* v. *Baltimore Grain Company et al.*, 267 U. S. 586.

A partial restatement of the argument of our main brief will be necessary in this connection.

The Question Involved.

This case presents squarely the question whether the Commission has power to require corporations engaged in the manufacture of steel and iron products or in the production of coke to file with the Commission monthly reports giving the costs and sales prices of products manufactured by them and a vast amount of other information regarding their manufacturing operations and purely intrastate activities, simply because a part of their manufactured products is sold, and a part of the raw materials utilized at their plants is purchased, in States other than those in which those plants are located. Two or three of the Appellees apparently do not purchase any of their raw materials or sell any of their manufactured products in interstate commerce (Record, page 79). All the others sell some portion of their manufactured products, and most of them purchase or produce some portion of their raw materials, in States other than the States where their respective manufacturing plants are located.

The Character and Extent of the Information Sought and the Purpose of the Commission in Requiring It.

The arguments in the Supplemental Brief for the Commission (pages 4, 14-15) as to the reasonableness of the

demand of the Commission might give the erroneous impression that the information called for in this case is information to which publicity already is given by the Appellees, either in reports to stockholders or in reports to State authorities or to stock exchanges on which the various Appellees may have listed their securities. Such an impression would be wholly contrary to the facts. The information called for by the Commission is not of the same character as that furnished in annual reports to stockholders or required to be filed with State authorities or with stock exchanges, but is wholly different. The kinds of information called for by the Commission are so numerous and comprehensive that if its power to secure the information which it has demanded could conceivably be sustained there would be no limit to the scope of the reports which the Commission could require. It contends that there is no limit to the frequency with which reports may be demanded. The demand is particularly shocking because it aims especially at costs and profits, the most jealously guarded secrets of every manufacturer.

The Commission served upon each of the Appellees an order (Record, page 12) reciting that the Commission, pursuant to a resolution adopted by it under the powers conferred by paragraphs (a) and (b) of Section 6 of the *Federal Trade Commission Act*, 38 Stat. 717 (hereinafter called the Act), and a special appropriation by Congress, required each of the Appellees to furnish monthly statements of information regarding its business covering a wide range and specified in the forms prepared by the Commission and accompanying the order. With the order the Commission furnished instructions for filling out the forms. It also gave instructions and directions as to the form and contents of accounts to be kept and the allocation of expenditures in calculating manufacturing costs and profits.

The information called for by the order may be summarized as follows:

> (1) statements of the quantities of 44 specified products produced at each plant;

(2) cost sheets covering 25 specified products for each battery of ovens, furnace, mill or other unit of operation;

(3) statements of sales prices, meaning "the actual realization f.o.b. mill, after deduction of freight allowance made to purchaser," in respect of 19 specified products, including separate reports thereon in respect of domestic and export shipments;

(4) statements of the contract prices, meaning "the base price less freight allowance to be paid by purchasers and to be deducted from invoices", specified in orders booked or formal agreements for future delivery entered into during the month in respect of the same 19 products;

(5) statements of the capacity of the ovens, furnaces, works and mills in respect of 18 specified products;

(6) statements of orders booked during each month and quantity of unfilled orders outstanding at the end of each month for the same 19 products the sales and contract prices of which were to be reported; and

(7) statements of the depreciation and general administrative and selling expenses allocated to 17 specified products, details of income from other sources, balance of net income transferred to surplus, with details of interest, rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies, income from outside investments, and details of deductions from net income, federal income and excess profits taxes, interest on bonds and notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officials, etc. (Record, pages 15 to 34.)

If the Commission can lawfully require from manufacturing corporations information of the broad character of that above summarized, there is no limit to the information which it can require.

So as to the frequency of the reports. If the Commission may call for monthly reports, it may call for weekly reports or daily reports.

So as to the purposes for which the information is sought. Among the possible purposes that are disclosed by the Commission's answer and by the Brief of its counsel are the following:

> the ascertainment and disclosure of the causes of high prices of commodities, including necessaries of life (Appellants' Main Brief, pages 52-53);
>
> publication for the information of the public and others in the industry (Record, page 78);
>
> the stimulation of competition which the Commission believes would automatically result from the publication of costs and prices (Appellants' Main Brief, page 70);
>
> the regulation of the interstate commerce of the Appellees by such publication and the avoidance of more drastic forms of regulation (Record, page 87);
>
> making reports and recommending legislation to Congress (Record, page 87); and
>
> preventing undue fluctuations and panic markets (Record, page 87).

If the Commission can lawfully obtain information for these purposes, it can obtain information for any conceivable purpose.

So also as to the degree of publicity which may be given to the information obtained by the Commission. It is true that in the present case the Commission disavows any intention of publishing any information given by a particular manufacturer. It may, however, change its mind. Whatever be its intention in the present case, in another case it might make public all the information. It undoubtedly has the power to make public in any way it chooses all the information it obtains, subject only to the limitation imposed by the Act that it shall not make public "trade secrets and names of customers".

So as to its power to summon witnesses. There can be no doubt that the Commission has power to require the testimony of witnesses and the production of records in relation to any subject in respect of which it may require reports, and, under Section 9 of the Act, in any case in which the Commission is authorized to obtain information it can require the attendance of witnesses from any part of the United States.

Therefore, if the power now claimed by the Commission is sustained, the Commission will be in a position to require manufacturing corporations a portion of whose products enter into interstate commerce to file at such frequent intervals as the Commission may desire sworn reports giving unlimited information regarding their affairs for any purpose the Commission may have in view, give to the reports such publicity as the Commission in its unrestrained discretion may deem wise and summon witnesses from any part of the United States for examination regarding the contents of the reports.

Argument.

Whatever Authority the Commission Had for Requiring the Information Must Be Found in the Act.

As the Appellants in their Supplemental Brief (page 23) admit, the authority for requiring this information cannot be found in the Deficiency Appropriation Act of November 4, 1919 (41 Stat. 327, 328), referred to in the order of the Commission. That Appropriation Act did not enlarge the scope of the powers of the Commission as found in the Act creating it. Except for the Act, there is no source from which such authority could be claimed.

The Tobacco and Grain Companies Cases.

It will be convenient to start the present discussion with an analysis of the decisions of this Court in the *Tobacco Companies* case and the *Grain Companies* case,

supra, with a view to determining the extent to which the law as therein decided is applicable to the present case and the respects in which the facts in those cases differ from the facts in the present case.

In both the *Tobacco Companies* case and the *Grain Companies* case the order of the Commission in question required not *reports,* as in the present case, but the production of books and papers for inspection by the Commission or its agents. In both the *Tobacco Companies* case and the *Grain Companies* case the only possible source of the authority of the Commission was paragraph (a) of Section 6 of the Act, which is as follows:

> "Sec. 6. That the commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce and its relation to other corporations and to individuals, associations, and partnerships."

In neither case was there a proceeding under Section 5 of the Act by which "unfair methods of competition in commerce are * * * declared unlawful", or an investigation under paragraph (d) of Section 6, which authorized the Commission "upon the direction of the President or either House of Congress, to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation". In paragraphs (c), (e) and (h) of Section 6 investigatory power also is given the Commission, but for exercise only in the special and limited instances therein discussed, none of which could apply in either of the two cases under discussion.

The Commission, therefore, was acting solely under the authority that is set forth in the language which we have quoted from paragraph (a) of Section 6. In the attempt to exercise its power under that paragraph, it invoked the authority of Section 9, which provides "that for the pur-

poses of this Act the Commission or its duly authorized agent or agents shall at all times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against."

The Commission was, therefore, seeking to exercise what would seem to be the broadest investigatory power that is set forth in the Act, namely, the power to "investigate * * * the organization, business, conduct, practices and management of any corporation engaged in commerce * * * and its relation to other corporations and to individuals, associations and partnerships." In so far as the mere terms of the Act are concerned, it would be difficult to imagine a broader or more unrestricted grant of power of investigation. It is practically unlimited as to subject matter and entirely unrestricted as to basis or purpose.

In each case the Commission purported to act pursuant to a resolution of the Senate directing the Commission to obtain information regarding certain phases of the tobacco trade in the one case and the grain trade in the other, but in each case, as in the present case, the Commission was granted no investigatory powers in addition to those conferred by the Act creating it. In each case the Court held that the Commission had exceeded the powers conferred by the Act. The *Grain Companies* case was decided upon the Court's opinion in the *Tobacco Companies* case.

In its opinion in the *Tobacco Companies* case, written by Mr. Justice HOLMES, the Court said (page 305):

> "* * * *The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, 43. *Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), *and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.*

We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.* The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318, 335. The question is a different one where the State granting the charter gives its Commission power to inspect.

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d ed., §293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co.* v. *United States,* 262 U. S. 151, 156, 157. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale* v. *Henkel,* 201 U. S. 43, 77. In the state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541. The form of the subpoena was not the question in *Wheeler* v. *United States,* 226 U. S. 478, 488.

"The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. *We assume for*

present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. *Wallace*, 258 U. S. 495, 520, 521, *but that possibility does not warrant a demand for the whole.* For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

"We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. *We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401." (Italics ours.)

In spite of these decisions in the *Tobacco Companies* case and the *Grain Companies* case (regarding which the Supplemental Brief filed on behalf of the Appellants is strangely silent) the Commission seeks to sustain the orders involved in the present case, presumably because they call for *reports* by the corporations affected rather than the *production and inspection of documents.*

It will be found, however, on analysis, that the order of the Commission in the present case is just as inquisitorial and indiscriminate as were its orders in the *Tobacco Companies* case and the *Grain Companies* case. More-

over the Commission had announced its purpose to examine the books of the Appellees in order to check the reports. In its answer (Record, page 80) the Commission alleged the necessity of so doing to determine whether or not the penalty provided in Section 10 of the Act should be enforced.

In the *Tobacco Companies* case and the *Grain Companies* case the orders involved the authority granted by paragraph (a) of Section 6 of the Act. In the present case the Commission bases the authority for its order upon paragraph (a) and also upon paragraph (b), which latter reads as follows:

> "(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

It will be observed that the subject matter of investigations under paragraph (b) is the same, and is described in exactly the same words, as the subject matter under paragraph (a), and that the terms of the authority are just as broad and unrestricted in one as in the other as to either basis or purpose of any investigation.

As a matter of fact, the authority for the order requiring monthly reports in the present case cannot be found in paragraph (a), for there is nothing in that paragraph

or in Section 9, which provides the machinery for enforcing paragraph (a), that in any respect authorizes the Commission to require *reports* from corporations under investigation. Section 9 provides

> "That for the purposes of this Act the commission, or its duly authorized agent or agents, shall * * * have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *"

Therefore, if the Commission sought to "investigate" a corporation under the authority of paragraph (a), it could, under Section 9, demand the production of "documentary evidence" and the attendance of witnesses. Clearly it could not under such authority or Section require the corporation to prepare and submit reports or written answers to questionnaires.

Therefore it is in paragraph (b), if anywhere, that the authority of the Commission for requiring in the present case monthly reports from the Appellees must be found.

Examination of the entire Act shows that the power that it purports to grant to the Commission in the examination of corporations under paragraph (b) is even more drastic than the grant expressed in paragraph (a), for in case of an order issued under paragraph (b) not only could the Commission proceed under Section 9 to require compliance by mandamus, but a penalty is also provided for under the following provision of Section 10 of the Act:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the

Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

It will be observed that this penalty is applicable only to a failure to file an "annual or special report" required by the Commission pursuant to paragraph (b).

The Law Laid Down by This Court in the Tobacco Companies Case and the Grain Companies Case Applies to the Present Case.

It would therefore seem to follow that the considerations which prompted the Court in its decision in the *Tobacco Companies* case and the *Grain Companies* case to limit the inquisitorial powers of the Commission apply with equal, if not greater, force to the present case.

Every objection offered to the inquisition in the *Tobacco Companies* and *Grain Companies* cases applies to the present case. There is the same risk of "the interruption of business or possible revelation of trade secrets and the expense that compliance with the Commission's wholesale demand would cause". There is the same effort, "in the hope that something will turn up", to conduct a "search", in this case by requiring *reports* of indefinite and indiscriminate scope rather than by the examination of "all the respondent's records, relevant or irrelevant", although in this case such an examination following the filing of the reports was threatened. In the present case, as in those cases, "the demand was not only general, but extended to information concerning business done wholly within the state." In the present case, as in those cases,

the possibility that "some part of a presumably large mass of" information "relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant * * * does not warrant a demand for the whole". To the present case may be applied with equal force the emphatic declaration of the Court in its opinion in the *Tobacco Companies* case that

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

and the final observation that "we cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."

Analysis of Supplemental Brief of Appellants.

Most of the argument in the Supplemental Brief of the Appellants is in effect an argument against the views of this Court in its opinion in the *Tobacco Companies* case, although as already remarked no mention is made of the decision in that case or in the *Grain Companies* case. That argument endeavors at length to prove the reasonableness of the demand of the Commission. But the Court in the *Tobacco Companies* case did not rely on the extensiveness of the demand, nor did it base its decision on the ground that being unlimited the demand would involve an unreasonable search. It said (p. 306):

> "The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations."

The decision stands squarely upon the ground that it is inconceivable that Congress should have intended to grant to the Commission the right, in its own discretion, to examine any papers of a corporation simply because it engages in interstate commerce.

We, therefore, may fairly begin our discussion of the argument offered on behalf of the Commission by applying to the present case the observation from the opinion of the Court in the *Tobacco Companies* case that "nothing short of the most explicit language would induce us to attribute to Congress" the intent to confer upon the Commission the indiscriminate inquisitorial powers now sought to be exercised.

Applying that test, it is impossible to sustain the powers claimed by the Commission.

The Only Periodical Reports Authorized Are Annual Reports.

In the first place, the Act does not in any case authorize the Commission to require *monthly* reports. As already pointed out, the authority conferred by paragraph (a) to "investigate * * * the organization, business, conduct, practices and management of any corporation engaged in commerce" does not extend to the requirement of *reports*. Inquisitorial power under that paragraph apparently can only be exercised through the machinery of Section 9 providing for access to "documentary evidence" and the "attendance and testimony of witnesses."

As stated above, the authority, if any exists, for the order in question requiring monthly reports must, therefore, be found in paragraph (b). That paragraph, however, only authorizes the Commission to require of corporations engaged in interstate commerce "*annual* or *special*, or both annual and special, reports or answers in writing to specific questions". In the Report from the Committee on Interstate and Foreign Commerce which is attached as Appendix A to the Main Brief of the Appellants is found the following explanation, by the member of the Commit-

tee who submitted the Report, of the purpose and nature of the provisions subsequently embodied in the present paragraph (b):

> "12. There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them.
>
> "13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial conditions, and general business conduct of those concerns."

The bill so submitted provided for the filing of regular annual reports by all corporations affected having a capital of more than $5,000,000. The bill also provided that the Commission should have power to classify corporations having a smaller capitalization and to require similar regular annual reports from classes of such corporations. The report then proceeds to explain the nature and purpose of the *special* reports to be required, as follows:

> "15. The Commission, under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary."

It is therefore clear that, in so far as the requirement of *periodical* reports is authorized, only *annual* reports were contemplated. In proposing to authorize special reports the Committee, at least, did not have in mind periodical reports, but only special reports prompted by some special purpose or emergency, such as the case where the

information furnished by annual reports proved inadequate.

It seems hardly necessary to give serious consideration to the contention that a special report might be required each month indefinitely by the service of a special order each month and that therefore the requirement in one order of a recurring monthly report was a simple means to the same end. Clearly a special report from its very name must be prompted by a special purpose. A monthly recurring special report is a contradiction of terms.

Manifestly there is a vast difference between authority to require annual reports, or a special report for some particular purpose, and authority to require recurring reports at any regular intervals, however frequent, that the Commission might fix. If the Commission can require monthly reports it can require weekly reports or daily reports. Certainly an intention of Congress to authorize the Commission to require reports of unrestricted frequency would require clear and unequivocal language, while the language of paragraph (b) clearly indicates that the only periodical reports authorized are annual reports.

The Order Is Invalid Because Not Limited to Interstate Commerce.

Not only must the order in the present case be held to be beyond the power of the Commission because it requires neither annual reports nor special reports, but also because the information for which it calls is not limited to interstate commerce. It extends to activities which are purely intrastate; in fact, it is only information as to such activities that is primarily desired by the Commission. Clearly the major part of the information sought relates to production and manufacture and intrastate transactions and has only the most remote and indirect bearing upon interstate commerce, if it has any. This is especially true of the information sought regarding "quantities produced, costs and methods of computing costs, expenses of general

administration, capacity of plants, depreciation and accounting methods and detailed statements of income". It is difficult to see how information on these subjects can have any relation to interstate commerce sufficiently close and direct to justify the Commission in requiring the production thereof to aid the Commission in any legitimate function which it may exercise in connection with interstate commerce. It is too obvious for argument that the functions of the Commission and the Act itself deal solely with interstate commerce.

The only information sought which on any theory may possibly have any direct bearing on interstate commerce is that regarding prices and the volume of orders booked and filled. Such information, if required, should be confined to interstate transactions. Excepting only export sales and contracts, the report forms do not call for even one item of information concerning that commerce which is within the power of Congress to regulate; nor do they indicate any interest on the part of the Commission as to such commerce or any endeavor to distinguish between it and intrastate matters.

It is unnecessary, however, for us to indicate, or for the Court to decide, what reports Congress can properly require or has properly authorized the Commission to secure from the Appellees. The question is a much narrower one than that, namely:

Because manufacturing corporations *to some extent* buy and sell goods in interstate commerce has the Commission power to require them to file monthly statements of their *financial and manufacturing* operations and reports of their business *of the kind here demanded?*

Extent of the Power Claimed by the Commission.

Contrary to the contention of the Commission, there is nothing unusual in the organization or corporate character of the Appellees that confers upon the Commission any peculiar authority in regard to them. The only relation

which the Commission conceivably can have towards them is in respect of their dealings in interstate commerce. The same relation would obtain in respect of other corporations which, as do the Appellees, sell some of their products or buy some of the raw materials used by them in a State other than the State of manufacture or production.

Furthermore, as pointed out in our main brief, the power claimed to be vested in Congress, which the Commission seeks to exercise, has nothing to do with the form of organization under which the business is conducted or with the nature of the business. Therefore, if Congress has the power for which the Commission contends, it must be admitted that not only has Congress the same power over any other corporation engaged in any productive industry but also that Congress has, and could delegate, like power over any firm or individual engaged therein. Thus the same power could be exercised by Congress in respect of the costs and profits of every farmer or individual manufacturer or trader or any corporation engaged in farming or any branch of manufacture or trade. We do not know of any case or of any suggestion in any case which furnishes any basis for a claim of such enormous power in Congress over the private affairs of individuals or corporations involving their manufacturing and other intrastate activities.

The Power of Congress Under the Commerce Clause Is Limited to Preserving Freedom of Commerce.

In our main brief (Pages 58-78) we have pointed out the nature of the regulatory power of Congress and have endeavored to indicate its limits. We have also analyzed the nature of the power which Congress attempted to confer upon the Commission and we believe that we have shown that the power which the Commission is seeking to exercise not only has not been conferred upon the Commission but could not be conferred upon it by Congress. The reason, as we have shown, is that Congress cannot regu-

late corporations engaged in manufacture either because they are corporations or because they incidentally transact interstate business, nor can it regulate those subjects, even though connected with the interstate transactions of the Appellees, into which the Commission particularly seeks to inquire, that is, the costs, selling prices and profits of the Appellees.

In the

First Employers Liability Cases, 207 U. S. 463, 502,

the Court said of the contention that Congress can regulate all the affairs of a corporation which engages to any degree in interstate commerce (the corporations in that case being common carriers):

> "To state the proposition is to refute it. *It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve,* since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject however inherently local, would obliterate all the limitations of power imposed by the Constitution and would destroy the authority of the states as to all conceivable matters which from the beginning have been and must continue to be under their control so long as the Constitution endures." (Italics ours.)

Chief Justice MARSHALL, in

Gibbons v. *Ogden,* 9 Wheat. 1, 196,

defined the power to regulate interstate commerce as the power "to prescribe the rule by which commerce is to be

governed." As to the power to regulate prices this Court, speaking by the present Chief Justice, has recently declared, in

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 537:

> "It has never been supposed, since the adoption of the constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * * ".

In Section 2 of the Clayton Act Congress has, it is true, legislated regarding certain relations between various prices, but such legislation is not aimed at prices as such and does not seek the naming or raising or lowering of prices. It is not concerned with the mere figure at which certain prices may stand. It deals merely with a practice, of those who may have interstate transactions, which may impair that freedom of interstate commerce that the commerce clause was intended to enable Congress to preserve.

The chief difficulty with the position of the Appellants is that they apparently do not take into account the nature of commerce. It appears to be their belief that any transaction engaged in between citizens of different States or which may involve the crossing of State lines is interstate commerce and that Congress can enact any conceivable legislation not only in respect of such transaction but also in respect of the business of those interested in such transaction or, if those so interested be corporations, then in respect of the corporations themselves. We believe that interstate commerce has a larger significance, that it includes not only the crossing of State lines but also, and more particularly, the effect on the welfare of the States as a union. The history of the Constitution itself reveals that the commerce clause was adopted with a view to preventing one State from interfering with the freedom of the con-

duct of business by its citizens in other States and by citizens of other States in such State, that is, the fundamental idea was, as indicated in the *First Employers Liability Cases, supra,* to maintain the fullest possible freedom of trade within the boundaries of the union.

Congress Can Not Fix or Regulate Prices to Be Charged by Manufacturers.

Even if it were to be assumed that the Commission, in order to determine whether or not a manufacturer in his practice respecting prices is discriminating against certain customers or sections, may investigate the *actual prices charged* in interstate commerce by such manufacturer, it would not follow that the Commission merely to inform itself as to the *average prices charged* for specific articles can investigate the profits of the manufacturer and his manufacturing costs. The average prices of the Appellees, or of any of them, would not reveal any violation by the Appellees, or by any of them, of the Clayton Act or of any other Act of Congress, and we are unable to conceive of any action which Congress might take in respect of average prices or profits.

The conduct of those engaged in interstate commerce that Congress may authorize a commission to investigate is that conduct which there is reason to believe may have violated some rule prescribed by Congress, and possibly also in particular cases such conduct as Congress may particularly desire to have investigated because deemed so to affect others engaged in interstate commerce as to require exercise of the regulatory power of Congress to a definite end. Although the conduct of one or more traders in interstate commerce resulting in the artificial control of such advance or fall of prices and the consequent lack of freedom of interstate commerce may be regulated and, hence, investigated in proper circumstances and in a proper manner, the advance or fall of prices as such is not subject to regulation by Congress. Hence, the fact that Congress

desires to be informed thereon is no warrant for it to invade the privacy of buyers and sellers who agree on such prices.

The only power which Congress has in respect of the obtaining of information is to obtain by proper methods that information which may be useful in the exercise of such powers as have been granted to Congress. Its power to obtain any information is in any case only an implied power as there is in the Constitution no delegation to Congress of general investigatory power, except under the census clause. Therefore, the implied power must be traced to the necessity of its use in connection with the exercise of some specifically granted power and when in respect of interstate commerce information is sought by Congress, its right to secure the information must be tested by the relevance of the information desired to the possible regulation by Congress of interstate commerce.

Such information, therefore, must be useful to Congress in connection with some rule which Congress can prescribe for the regulation of interstate commerce. This clearly does not apply to information sought solely for the purpose of learning the cost of manufacturing a particular article or the price at which that article was sold, since Congress has not been given any power to fix a rule governing the price at which any article shall be sold in interstate commerce. It is proper for Congress to prescribe a rule, and Congress has prescribed some rules, governing the action of several acting in combination in *fixing* prices where such action in combination would be an impairment of the freedom of commerce. Congress has also prescribed a rule that one may not so name prices for the same articles in different territories as to affect the freedom of others in interstate commerce by discriminating in favor of territories where competition is keen and to the disadvantage of territories where there is no competition. In such legislation Congress has not claimed any power to say how high or how low the price shall be for any article or what profit shall be made in the sale thereof, but has sought only to maintain the freedom of others engaged in interstate commerce from restraint by a particular seller who may be in

position to usurp the power of Congress to regulate interstate commerce.

Facts as to the actual prices charged by a corporation for goods sold by it in interstate commerce and the amount of its profits thereon cannot, in the absence of further evidence as to many other conditions, be shown to have any relevancy to any rule which Congress has prescribed or may prescribe for the regulation of interstate commerce and, therefore, there is no implication in the Constitution of a power in Congress to compel any corporation to divulge the cost of making any of its product, the price at which any of them is sold or the profit made on the sale. It is even more obvious, that what is here required, namely, the *average price* on all sales of various articles in an entire industry, cannot have such relevancy.

The demand of the Commission does not concern any elements or phases of the affairs of the Appellees that Congress can regulate, or involve in any respect the manner in which the Appellees conduct their interstate transactions. The demand is limited to manufacture and the incidents thereof, particularly to the costs of manufacture (although manufacture is not commerce and is not subject to congressional regulation), the profits from manufacture and from the sale of the products thereof (whether such sale be in interstate commerce or not), the average of the prices at which such sales have been made (for the mere sake of knowing such average and without any relation to any conceivable rule which Congress might prescribe for the regulation of interstate commerce) and the methods of accounting by which the manufacturer calculates his cost (although Congress cannot regulate costs or accounting systems merely because a manufacturer, trader or farmer sells his output partly in interstate commerce). None of the information demanded is information as to any element or phase of the affairs of the Appellees which Congress can regulate or bears in any manner on any of their conduct which may be in, or may affect, interstate commerce.

The Fifth Amendment Is Involved.

It is also argued by the Appellants that the provisions of the Fifth Amendment relating to the taking of property without due process of law do not apply, since the Appellees have stipulated that the outlay in furnishing the information demanded would not be extraordinary or unreasonable. There is no warrant, however, for the statement that property would not be taken without due process of law if the Commission should compel the filing of the reports demanded.

In any industry in which keen competition exists, particularly in an industry such as the steel industry, where great capital is required to be invested in permanent plant and a skilled organization must be maintained and hence operations must if possible be continued even though costs exceed selling prices, costs are closely guarded trade secrets. In any period when demand is light, if there are two producers competing for the business each is willing to go as far as possible below his competitor's price but his aim naturally will be not to go below his own cost unless necessary. If one knows his competitor's costs he knows how far his competitor can go without loss in order to secure the business and it is, therefore, of great importance to each that his own costs be not known to his competitor.

To require the divulging of costs on each product of their mills does involve the taking of a trade secret, namely, costs, which each of the Appellees strives to guard as jealously as possible. Trade secrets, of course, are not sacred and presumably may like any other property be taken by the Government for public use but, like other property, they can be taken only by due process of law and for a reasonably necessary public use. There is no due process in the taking of trade secrets by an administrative commission which cannot administer any law in respect of such secrets or use such secrets in establishing any violation of law. No violation of law is under investigation or charged in this case. The trade secrets are to be

taken for the avowed purpose of publication, which is put forth as the principal object and the justification of the taking.

The Commission cannot assure the safeguarding of the secret information demanded.

The Appellants suggest that this case presents the question whether Congress must obtain information through special committees or commissions appointed to act on pending matters or may adopt the more scientific method of creating permanent commissions with authority to require periodical reports and obtain information by experts who are likely to ask for necessary and useful information without partisan spirit and are less likely to bring out matters which ought to be kept private than would be a temporary committee attempting the same work. The Appellees are objecting not to the permanency of the Commission but to having their private affairs investigated, whether by experts or novices, for the purpose of publication. It may be that the Commission will always consist of or employ only experts and that experts would be less likely to bring out matters which ought to be kept private than would be a temporary committee, but the appalling disregard for privacy shown by the Commission in its demands and in its pleadings and arguments does not stimulate confidence on the part of the Appellees in the judgment of the Commission or its experts as to what should be kept private. Moreover, as we pointed out in our Main Brief, the Commission cannot furnish any assurance to the Appellees that, once the Commission has secured the information, Congress will not make public all of it, nor does or can the Commission offer to any Appellee any redress if inadverently or otherwise any of the information should be wrongfully divulged.

The Vagueness of the Power Claimed.

It appears to be the view of the Commission that the information the power to secure which can be delegated by Congress includes any information that in any manner

may involve any subject over which Congress can legislate. In support of this position the Commission asserts that the power is not dependent on the attention of Congress being specifically directed to particular legislation. From the language used by the Court in various cases the true principle would appear to be that power to require the divulging of information may be delegated in so far as the information to be required may be material to the question whether some enactment of Congress has been disobeyed. But, however this may be, what we have endeavored to show is that in the present case, whether this principle be sound or the view of the Commission be correct, if the information sought cannot, in the circumstances in which it is sought, have any pertinency to some rule which Congress has power to prescribe for the regulation of interstate commerce, Congress obviously cannot compel the furnishing thereof.

It is a corollary of the position of counsel for the Commission that whenever the Commission seeks to compel a corporation to furnish information and the right of the Commission to require the information is contested in court, it then becomes the duty of the Court to take a survey, not of the Act, or merely of all the legislation which Congress has ever passed under the commerce clause, but of all possible legislation which Congress conceivably might pass under that clause, because according to the theory of counsel if by any rational possibility the information relates to any legislation which Congress could pass under that clause, then there is a right in the Commission to require, and a duty upon the part of the corporation to furnish, the information and a duty upon the Court to compel the furnishing thereof.

When the Courts of the United States deal with the grave question of the constitutional power of Congress, they do so only with respect to a specific legislative act and consider whether that concrete enactment is within the power of Congress. The contention that the Courts should assume the additional function of determining what Congress might do but has not done, and that to this end

the Court in each case must cover the whole range of Congressional power under the commerce clause, was made and was emphatically denied by this Court in the case of

Harriman v. *I. C. C.*, 211 U. S. 407, 417.

It is noticeable that in the other paragraphs of Section (6) that purport to give investigatory power over domestic corporations, namely, paragraphs (c), (d) and (e), the power is limited to cases of violation or alleged violation of the anti-trust laws. This is true even in paragraph (d) under which investigation may be directed by the President or either House of Congress.

When one engages as a public agent in the service of the public in respect of interstate commerce, the power of Congress under the commerce clause may be exercised to control his conduct in interstate commerce. Whether or not one engages in a public calling for the service of others in interstate commerce, if his conduct is such as unreasonably to restrict the freedom of others in their dealings in interstate commerce his conduct can be regulated. When the conduct of the parties to any transaction or the transaction itself is such that it affects others directly, as where it impairs the freedom of others to engage in other transactions crossing State lines, then Congress can intervene by legislation. These principles do not apply here.

The Intermingling of Intrastate and Interstate Transactions Does Not Justify the Demand of the Commission.

Great stress is laid in the Appellant's Main Brief and in their Supplemental Brief on the contention that the business of the various Appellees cannot be distinguished or segregated as between interstate and intrastate business, although at the same time equal stress is laid upon the respective percentages of the two kinds of business transacted by various Appellees. We assume that the contention is not that the accounts of the Appellees are so kept that it cannot be determined what purchases and what sales are made in States other than those where the plants

and mines of the Appellees are located, but rather that the Appellees do not in the calculation of costs or in the apportionment of the gross receipts among the various credit and debit items normally distinguish between those products which are sold in the State where manufactured or are used in the State where purchased from those which, in connection with the purchase or sale, cross State lines. Presumably it costs as much for a corporation in Ohio to make a ton of steel which may be sold in Virginia or California as a ton which may be sold in Ohio. If for the sake of argument it were admitted that the cost of producing the steel manufactured in Ohio and sold in Virginia or California may be investigated by the Commission it would not follow that the Commission can investigate the cost of producing the steel which is sold in Ohio or that the requirement as to all the costs is not unreasonable and violative of the Fourth Amendment because unlimited in amount.

The contention of the Appellants is offered less as a justification for their entire demand than in exculpation of their demand for information respecting business which admittedly is not interstate. It is based on the paragraph numbered 18 in the amended answer (Record, page 86). That paragraph contains an allegation "that unless it can procure the information called for and required, the Commission will be unable to properly perform its duties under its act." This is a conclusion of law and is not made an allegation of fact by the irrelevant and argumentative reasons stated in the paragraph in support of the conclusion. What are the duties of the Commission is a question of law to be determined by the Court and not admitted by the motion to strike out the answer. In

Finney v. *Guy*, 189 U. S. 335, 343,

after quoting the following from

Eastern Building & L. Assn. v. *Williamson*, 189 U. S. 122,

"No witness can conclude a court by his opinion of the construction and meaning of statutes and de-

> cisions already in evidence. *Laing* v. *Rigney*, 160 U. S. 531. The duty of the court to construe and decide remains the same.",

the Court said:

> "This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign State and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial."

The rule would seem to be stronger when the law is that of the Court's own jurisdiction and not of a foreign State. On the motion to strike out the answer it was the function of the Court to determine whether from the facts properly alleged in the answer, it followed as a necessary legal conclusion that the Commission had a right to secure the information. On this particular pleading the Court had the obligation of interpreting the Act and determining the duties of the Commission. When those should be determined the question would still remain, what right had the Commission to the information demanded? The particular allegation on analysis comes down to a statement by implication that the Commission has a right to secure the information because required for the performance of its duties. That is the primary allegation in the paragraph and, being merely a statement of one of the points or legal conclusions to be decided in the case, of course it was not admitted by the motion. Hence the explanation offered, not as a basis or reason for the conclusion, but as an explanation of the demand for information as to intrastate as well as interstate affairs, was also not admitted.

Certainly the statement that the separation and subtraction of intrastate activities would render the result of little or no value in enabling the Commission to perform its duties either is purely argumentative and a conclusion of law or it is wholly irrelevant and immaterial. Either it is a statement that the information as to interstate matters alone would be useless, which statement does not deny any allegation of the bill or offer any affirmative defense, or it

includes by implication the conclusion of law that the Commission has the right to secure all information of value for the performance of what it conceives to be its duties. Whichever meaning be given to the statement, the motion did not admit it to be true.

The explanatory statements attached to such conclusions or immaterial allegations, whichever they be deemed to be, are not made as allegations but as explanations of why the Commission cannot perform its duties unless it secures the information. The Commission therefore has not properly alleged, as stated in the Supplemental Brief for the Appellants (p. 4), that the intrastate activities of the Appellees are so interwoven with their interstate business that it is impossible to separate them. Even if that were alleged, it is true, as is tacitly admitted in such Brief, that there is no allegation that the *accounts* of the two classes are intermingled. All that dared be said in such Brief is that *"it is a fair inference that the accounts* reflecting the operations * * * in interstate and intrastate commerce, and in business which is not commerce at all, *are more or less* commingled."

Commingling of Accounts Does Not Expose Them to Congressional Investigation.

The commingling of accounts does not give Congress any power to examine all the commingled accounts and the case of *I. C. C.* v. *Goodrich Transit Company*, 224 U. S. 194, does not so hold. That case certainly does not sustain the proposition that if reports may be required as to interstate business they may be required to cover also the intrastate business done by the same corporation. What that case does hold is that Congress has a right to certain information concerning interstate affairs of a common carrier, not because of the commingling of accounts, but because from the nature of the business the rates charged by the corporation for services rendered by it and the treatment of costs in its accounts were matters which were within the Con-

gressional power either as directly appertaining to interstate commerce or indirectly because involving possible evasions of Congressional regulations or because of their possible effect on interstate commerce. Since Congress does not have power to regulate the prices charged for goods sold in interstate commerce, the fact that information as to such prices is perhaps intermingled with information as to the prices of products sold within a single State does not warrant Congress in securing all the information as to all prices of any manufacturer.

The Intrastate Activities of the Appellees Have No Bearing on Interstate Commerce.

The Appellants also contend that Congress has the right to the information as to other than interstate commerce because the other operations of the Appellees have a direct bearing on their activities in interstate commerce. In the *Goodrich Transit Company* case, *supra,* from the nature of the case the rates charged for intrastate services or the expenses incurred in intrastate business might have a direct bearing on the reasonableness of the rates charged for interstate services, with which rates the Interstate Commerce Commission was authorized to deal. In the instant case Congress has no control over the mere amount charged by the Appellees for the goods sold by them even in interstate commerce and, therefore, regardless of any bearing which the cost of manufacturing such goods may have on the price thereof, such cost does not have any direct bearing on interstate commerce or any phase thereof over which the Commission or Congress has jurisdiction.

The price charged for a commodity may of course have a bearing on interstate commerce therein in the sense that if the public has been accustomed to buy cotton at between 10 and 15 cents per pound and the price thereof is raised to between 30 and 40 cents a pound, the ability or willingness to buy cotton and the amount of interstate commerce in cotton may thereby be reduced. Such bearing, however,

is not the direct bearing on interstate commerce which is referred to in cases where it has been held that the intrastate affairs there involved had such a direct bearing on interstate commerce that Congress could regulate the intrastate affairs.

Congress does not have control over prices *per se* such that it can establish the rule by which a seller must name his price or the purchaser name the price which he is willing to pay. The Court has repeatedly held that a person engaged in a business not charged with a public interest, such as the manufacturer or mining operator, may sell or not sell to any one in interstate commerce or otherwise solely at his own pleasure and that he may sell at such price as he and the purchaser may agree upon.

> *Wolff Packing Co.* v. *Court of Industrial Relations, supra.*

Congress may prescribe any rule which it may reasonably deem necessary to prevent those making an agreement from directly affecting the interstate commerce of others and thereby impeding the freedom of interstate commerce which the commerce clause was intended to preserve.

Thus neither by reason of the intermingling of the accounts nor by reason of any bearing that prices as such may have on interstate commerce does Congress have any control over prices in and of themselves, and there is therefore no reason why Congress should be held to have the power to inquire into prices, merely as prices, or into the constituent elements of the cost on which to some extent such prices may be based. Hence the Commission has not been given and could not be given any power to inquire into prices charged by the Appellees for the commodities manufactured or mined by them, except perhaps in so far as the Commission may require reports concerning, or conduct an investigation into, some specific question connected with the obedience of some or all of the Appellees to some rule involving prices which Congress has established for the regulation of interstate commerce

or some question material and relevant to possible regulation by Congress. There is no indication that the Commission had any such rule in mind; its avowed object was to publish the results of its investigation. In any event, the average of prices cannot be involved in any such rule.

The Examination of Books to Check the Reports Must Be Also Properly Limited.

The Supplemental Brief contains a curious argument to support the contention that the information which may be required to be reported is not limited to interstate business. It is claimed that the Commission has the right to examine the books of the Appellees to verify the reports which it requires to be filed and that in such verification it would of course be necessary to examine the figures on all the business of the Appellees, whether interstate or intrastate. This argument amounts to a claim that because the Commission later on would exceed its authority it should be permitted to exceed such authority at the outset. The Commission's right of access to the books for the purpose of verification of the figures included in reports clearly cannot be any greater than its right to require the filing of reports.

In the *Tobacco Companies* case, *supra,* the Court has just decided that the only authority given to the Commission to examine documents or records of a corporation is limited to those documents and records which are material to some investigation of a particular corporation or some proceeding against such corporation. The Act does not contain any specific grant of authority to the Commission to examine records merely to verify reports made to the Commission. We are unable to see any distinction as to the reasonableness of search between an inspection of the records, which according to the *Tobacco Companies* case, *supra,* must be in a proceeding against or investigation of a particular corporation, and the filing of a report which must be correctly made out and duly authenticated under the compulsion of a threatened penalty or a man-

damus proceeding, except possibly that the former may in some cases involve a greater degree of unreasonableness merely in the manner in which it may be conducted. Certainly if reports when filed are to be checked against the books, the right of access to the books must be subject to the principles laid down in the *Tobacco Companies* case, *supra*. If that be not so, the power of the Commission is less restricted when a violation of law is not charged than when an alleged violation is being investigated.

Profits or Prices Are Not the Concern of the Commission.

In their Supplemental Brief the Appellants endeavor to prove their power to secure information of the several kinds demanded. They argue that the cost of production of merchandise sold by the Appellees in interstate or intrastate commerce may be required because without knowing the cost the Commission cannot know what are the profits of the Appellees and, they contend, it is entitled to know such profits because the public is vitally interested in the prices and profits of the Appellees, and information respecting prices and profits made in interstate commerce is of vital importance in dealing with commerce. It is stated that the principal object of legislation affecting combinations in restraint of trade and regulating interstate commerce is because of the effect on prices.

In an investigation, whether as to a violation of law already enacted or as to the advisability of enacting further legislation for the regulation of commerce, the prices actually charged for commodities sold in interstate commerce may be of some value as evidence. The prices themselves, however, taken apart from all other circumstances, would not have any value as evidence. The facts as to prices would be evidence, that is, they might be material to such an inquiry, but only after proof that there were influences at work affecting such prices which were not the result of the unhampered play of economic forces.

Thus the facts as to prices and such other proof might tend to prove that some one other than Congress was regulating interstate commerce, that it was establishing the rule whereby such commerce should be governed. Congress in effect has said that it is unlawful for two or more people to agree that certain commodities shall not be sold except at certain prices. The Courts have sustained such legislation not because the prices so affected were too high or too low, but because it is proper for Congress to forbid any one interfering with that freedom of interstate transactions which by the commerce clause was to be protected by Congress. The purpose of all such legislation, therefore, is to prevent a usurpation of Congressional function. Unless therefore the facts as to prices are required in connection with some investigation as to whether or not the freedom of commerce is being restrained, Congress has no interest in prices and hence in the profits made on such prices, and therefore none in the costs upon which such profits are calculated.

Productive Capacity and Production Do Not Concern the Commission.

The argument that plant capacity, actual production and unfilled orders are matters of importance to Congress because certain conclusions might be drawn from such information if it revealed certain conditions is not very conclusive. In the Supplemental Brief it is stated that if high prices and large profits were accompanied by capacity production and a continually increasing quantity of unfilled orders it would merely show that demand was outrunning supply, but that if the Appellees were found to be making large profits while their plants were partly idle it would indicate the presence of influences affecting interstate commerce requiring action or legislation. We are unable to see how interstate commerce would be less affected by high prices and large profits when plants are partly idle than when they are working to capacity.

Prices of grain may be high or low and profits of farmers may be great or small while the amount of land under cultivation may be greater or less, but, regardless of the combination of facts as to these, we do not see how any possible combination thereof would indicate influences affecting interstate commerce which would require legislation. As a general rule grain prices are fixed from day to day by the quotations in Chicago or Liverpool, which quotations affect the price in every farming village in the country. The fact that the price of grain and the profits of farmers may be very low may be deemed in time of stress a warrant for Congress legislating for the relief of the farmers, but we have not seen any suggestion in any case and it has not been contended any where in either of the briefs of the Appellants that such conditions would necessitate or authorize the requiring of information from every farmer as to his operating costs and profits.

If what the Commission means is that it would conclude from the fact that corporations were making large profits while their plants were partly idle that such corporations were combining to maintain prices regardless of reduced demand then it would be in order for the proper government authorities to investigate not the question of prices as prices or the question whether profits were large or small or the productive capacity or the use thereof, but whether the combination of particular corporations suspected in the case supposed actually existed. As an incident to the investigation of that question the proper authority might be warranted in requiring the production of evidence as to profits and prices.

Proper Subjects To Be Covered by Reports Can Readily be Suggested.

In the Supplemental Brief for the Appellants (Page 31) it is said that the "constitutional question cannot be avoided by any interpretation of the Act". On page 2 of the Supplemental Brief the question presented by this case is said to be whether the Federal Trade Commission had

power to require certain corporations engaged in interstate commerce to file with the Commission periodical statements of their financial operations and reports of their business. We have shown above that such is not the actual question presented, but if it were it might involve a constitutional question if the only possible interpretation which could be placed upon the Act would necessitate the conclusion that Congress had endeavored to give to the Commission the broad power contended for by its counsel. Such an interpretation is not necessary and, of course, will be avoided if there is another possible interpretation which will not lead to the attributing to Congress of "an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law".

Such another interpretation is open to the Court. As above stated it is unnecessary for us to indicate, or for the Court to decide, what reports Congress could authorize or has properly authorized the Commission to require. All that it is necessary for the Court to decide in this case is whether or not the Appellees can be required to file monthly the particular reports demanded by the Commission. The field of interstate commerce is so vast and the affairs of corporations engaged therein are so ramified that there would appear to be abundant opportunity for the exercise of the powers set forth in paragraph (b). A survey of the interstate matters as to which the Commission has been charged with specific duties would readily suggest numerous subjects, including various kinds of information "as to the organization, business, conduct, practices, management" and inter-corporate relations of a corporation, concerning which annual or special reports might perhaps be justified on the ground that they involve matters in respect of which the Commission has duties to perform. Without presuming to indicate the limits of the reports, which it is the province of this Court to mark out in proper cases, and without committing ourselves to the approval of any particular demand that might be made by the Commission, we can suggest the following duties of the Commission

as indicating possible occasions for the requirement of reports:

(a) Congress has enacted in Section 2 of the Clayton Act that it shall be unlawful for a person engaged in interstate commerce to discriminate in price between different purchasers of commodities where the effect may be "to substantially lessen competition or tend to create a monopoly". It may be that the Commission can secure from corporations reports bearing upon their conduct in respect of this enactment.

(b) Section 5 of the Act declares unfair methods of competition to be unlawful. The Commission is constantly passing upon questions involving the lawfulness of certain practices. Possibly reports might be required from corporations which should contain information showing whether or not practices which have been held unlawful are being employed.

(c) Congress, in Section 3 of the Clayton Act, has also declared it unlawful for any person engaged in commerce to insert a tying clause in any lease, sale or contract for the sale of goods in interstate commerce. We do not admit that the Commission could at its pleasure secure full information from corporations as to all their contracts in interstate commerce but the Commission might perhaps require reports of such a character that from them the Commission could determine whether or not tying clauses were being employed by the reporting corporations. Perhaps, also, corporations might be required to report the facts as to other contracts which might be deemed to amount to an unlawful restraint of interstate commerce.

(d) Section 7 of the Clayton Act forbids a corporation engaged in commerce to acquire stock of another corporation also engaged therein or of two

other such corporations where the effect may be "to substantially lessen competition" between the two or "to restrain such commerce" or "tend to create a monopoly". It is possible that reports could be required from corporations as to stocks in one or more competing corporations purchased by them.

(e) In Section 8 of the Clayton Act it is provided that no person shall at the same time be a director in any two or more corporations any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce so that the elimination of competition by agreement between such corporations would constitute a violation of the provisions of any of the anti-trust laws. Annual reports from corporations having the specified capitalization which should show the names of the directors thereof and the names of the other corporations, if any, in which any of such directors are also directors might be deemed proper.

(f) Under Section 10 of the Clayton Act a common carrier engaged in commerce is forbidden to have certain dealings to the amount of more than $50,000 in the aggregate in any one year with another corporation, firm, partnership or association when the carrier shall have as a director, president, manager, purchasing or selling officer or agent in the particular transaction a person who at the same time has a similar position or any substantial interest in such other corporation, firm, partnership or association unless the dealings shall be conducted on the basis of competitive bidding. Reports might perhaps be proper which should show those dealings of the reporting corporation with common carriers that might involve a violation of this enactment.

(g) Under the Webb Act (40 Stat. 516) corporations may without violating the anti-trust laws com-

> bine solely for the purpose of engaging in export trade. Reports as to membership in any such combination or association might possibly be required.

The foregoing is not intended to set forth a complete and exclusive list of the subjects which might be covered by annual or special reports from corporations, or even as a concession that, except under most careful limitations, annual or special reports as to any or all of such subjects might be required. It is offered merely to indicate the large field within which it is conceivable that annual or special reports of the character specified in paragraph (b) of Section 6 of the Act may be required and to suggest a reasonable interpretation of the language used in that paragraph which would avoid the attributing to Congress of any intent to defy the Fourth Amendment or to come so close thereto as to raise a serious question of constitutional law. The field for such reports may of course be widened as Congress shall hereafter commit to the Commission the enforcement of additional regulations for interstate commerce.

It is worthy of note that in the case of carriers engaged in interstate commerce, concerning which this Court has intimated there may be nothing private, Congress has specified in detail what can be required by the Interstate Commerce Commission in the way of annual reports.

Interstate Commerce Act, §20 (1), as amended, 34 Stat. 584, 586:

> "Such annual reports shall show in detail the amount of capital stock issued, the amounts paid thereon, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the char-

> ...ation of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; * * *."

The Report from the House Committee on Interstate and Foreign Commerce (copy annexed to the Commission's Main Brief) which was submitted to the House with the bill which, with amendments, was subsequently adopted as the Federal Trade Commission Act, described the annual reports provided for by the bill as reports "setting forth essential facts connected with the organization, stockholders, financial condition and general business conduct of those concerned." The Report expressed the idea that such reports would "afford one of the surest means of that publicity which would tend to an elevated business standard and a better business stability." The language used by the Committee indicates that what it was primarily interested in was the organization, financial condition and general (and specific) business practices of corporations, particularly of those having such financial strength as to give cause for concern, although it was recognized that small corporations may have such an organization or financial condition or a system of practices as to require publicity to bring about lawful methods in their business. Hence the original bill provided for the classification of corporations having a capital of less than $5,000,000, and that the Commission might also require reports from those so classified if it should deem it proper. An annual report that would meet what appear to have been the views of the Committee would give information as to the corporate structure, the stock holdings, the financial condition and the general business methods of the reporting corporation. Whatever may have been the views of the Committee or the intention of

Congress, there is nothing in the Report of the Committee to indicate that the annual reports desired were to cover costs of production, profits, accounting systems, or the other details of the corporate business such as the Commission has demanded in the present case. On the contrary, those subjects lie wholly outside the scope of the character of reports referred to by the Commission. Obviously the purpose was not to require periodical reports as to current business conditions in an industry.

Manufacturing Is Not a Public or Common Calling.

As observed by the Court in its opinion in the *Tobacco Companies* case, *supra*, "the mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public as those of a railroad company now may be".

The distinction is obvious between the present case and the series of cases decided by the Court on which the Appellants especially rely in seeking to support their proposition that it is entitled to obtain information from the Appellees regarding their intrastate operations, including production and manufacture, on the theory that those operations are in some way connected with or have a direct bearing upon interstate commerce. We refer to those cases in which the Court has upheld the power of Congress to authorize an administrative Commission such as the Interstate Commerce Commission, or an executive officer such as the Secretary of Agriculture, to require reports from, or to regulate the intrastate activities of, certain corporations because of the effect which their operations have upon the flow of interstate commerce.

Stafford v. *Wallace*, 258 U. S. 495;

Board of Trade v. *Olsen*, 262 U. S. 1; and

I. C. C. v. *Goodrich Transit Company*, *supra*.

In all those cases the Court was dealing with corporations which were not primarily engaged in commerce, but rather in the management of instrumentalities of commerce or activities affecting interstate commerce which, although intrastate in their direct application, had also a vital bearing upon the flow of commerce between states. Manifestly the misuse of such instrumentalities and activities would have a direct bearing upon interstate commerce and might result in the very evils in respect of interstate commerce which existing legislation seeks to correct.

Clearly those decisions have no bearing on the present case for here the manufacturing corporations concerned come in contact with interstate commerce only when they purchase or ship raw materials from mines in one State to plants in another or sell and deliver their own manufactured products in States other than the State of production. The manufacturing operations and intrastate sales of manufacturing corporations cannot affect the flow of interstate commerce; nor can the prices charged by manufacturing corporations even in interstate commerce be the subject of Congressional legislation as are the rates charged by carriers engaged in interstate commerce.

The Doctrine of the Harriman Case Applies Here.

While the considerations thus far advanced seem sufficient for the present case, we still rely upon the argument in our main brief that the present order is invalid because of the doctrine in the case of

Harriman v. *I. C. C.*, *supra*.

That doctrine is that, in order that such a public body as the Interstate Commerce Commission or the Federal Trade Commission may have authority to break down the barriers of privacy to obtain information, the investigation in which the information is sought must be deemed to relate to its other powers and the purposes expressed in

the statute. The Court said that, in the case of the Interstate Commerce Commission, the main purpose of the Act creating it "was to regulate the interstate business of carriers, and the secondary purpose for which the Commission was established, was to enforce the regulations enacted." In the case of the Federal Trade Commission the main purpose of the Act is to enforce its substantive provisions, chiefly the prevention of unfair methods of competition in commerce which the statute declares unlawful, to aid the Department of Justice in the entry of final decrees in anti-trust suits, to make investigations upon its own initiative of the manner in which such decrees are being carried out and to enforce certain provisions of the Clayton Act, which was pending in Congress at the time the Federal Trade Commission Act was enacted and was passed a fortnight later.

If the Commission merely for its own information can under paragraph (b) require the reports which it has demanded, then clearly the power which was denied in the *Harriman* case would be sustained, notwithstanding that it "is unparalleled in its vague extent" and that "no such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court." Furthermore that power would then be recognized where, as in this case, violation of law is not alleged or suspected, notwithstanding that limitations have, by the decision in the *Tobacco Companies* case, *supra*, been indicated for the exercise of the more limited power in cases of alleged violations of law.

On the Appellant's Own Argument as to the Fourth Amendment Its Order Violates That Amendment.

Finally, it automatically follows that, if and in so far as the order exceeds the authority of Congress to deal with interstate commerce, it is a violation of the Fourth Amendment, since, obviously, any search or seizure is unreasonable, and hence forbidden by that Amendment, unless some

reasonable necessity exists for invading the right of privacy.

The Commission has changed its position in respect of the Fourth Amendment. In its Main Brief it was argued that the Fourth Amendment applied only to criminal proceedings but that, at all events, if the Fourth Amendment might be invoked in other than criminal proceedings, corporations were not entitled thereunder to the same immunity as individuals. It is contended in the Supplemental Brief for the Appellants that the Fourth Amendment does not forbid all searches or seizures but only those that are unreasonable. It is therein admitted that the Fourth Amendment may be violated by the obtaining of information in a secret or intrusive manner accompanied by force or by a demand for information unreasonable in scope in that it unduly hampers the business of the citizen or imposes upon him unreasonable expense, and by implication it is argued that a search or seizure is not unreasonable unless made secretly, stealthily or in a burdensome manner.

The Appellants contend that the demand of the Commission in the present case is not unreasonable, because of various conditions which are asserted to exist. In support of this position the Appellants make certain vague statements (Supplemental Brief, pp. 14 and 15) which cannot be considered as of any weight as proving anything pertinent to this case. In those statements it is suggested that the "veil of secrecy has already been largely lifted from the affairs of corporations, especially of the type here involved"; that "corporations having vast capital and engaged in large enterprises usually have large numbers of stockholders entitled to periodical reports on the business, and the making of such reports to the stockholders broadcasts information respecting their affairs"; that "corporations having their stocks listed on stock exchanges for the information of investors file and publish very complete information respecting their affairs"; that "the information called for here is largely of the statistical type which modern trade associations exchange among

their members"; and that "a considerable part of the information called for in these reports could be obtained, if Congress authorized it, from the reports filed with the Commissioner of Internal Revenue."

If what is meant to be implied from these statements is that private matters of the character of those demanded by the Commission, particularly costs, selling prices and profits of the respective Appellees on particular products and all the details of their accounting practices, are no longer under the protection of the Fourth Amendment because of some peculiarity of the Appellees as corporations, or that all such information is required by the laws of one or more States to be filed in periodical reports for public inspection or that it is, or may be required to be, reported periodically to stockholders or to stock exchanges or to trade associations or to the Commissioner of Internal Revenue, then the statements are without basis in fact. Whatever the Appellants may have meant by such statements, they are inaccurate and misleading, for we are confident that ordinary business corporations of whatever type do not file with the States which incorporated them or furnish to their stockholders or to any stock exchange or trade association a very large and most important part of the particular information which the Commission has demanded in this case.

Whether corporations do so or not is, however, beside the point. To say that, because a limited number of corporations have, for purposes of their own, voluntarily disclosed certain information to their stockholders or competitors or to stock exchanges, or have complied with the provisions of the laws of the States of their incorporation requiring the filing of certain reports, every corporation (including those that have not done so) may be compelled by the Commission to make such information public would make the authority of the Commission depend not on a constitutional grant but on the caprice or whim of the Commission. Under such a rule, whenever the Commission thought that the number of corporations voluntarily furnishing such information to a more or less limited public was suf-

ficient to make it desirable to require all corporations to file reports with the Commission, it would have authority to do so. Any such conception of the powers of the Commission or of Congress is contrary to every fundamental principle of constitutional law.

Moreover, the Appellants themselves in their Supplemental Brief openly admit the soundness of the principle on which we have been insisting throughout, which utterly controverts the arguments heretofore presented by the Appellants as to the Fourth Amendment. In their Supplemental Brief (p. 13) the Appellants admit that under the Fourth Amendment "there may also arise the question whether the nature of the information is such as to make it reasonably required in the public interest". That Brief cites the case of *Kilbourn* v. *Thompson*, 103 U. S. 168, as a case "where a committee of the House of Representatives demanded information and evidence with respect to a matter on which Congress had no power to legislate, and where, investigation 'could result in no valid legislation,' and where it was only a fruitless and intrusive investigation into private affairs."

The principle announced in the *Kilbourn* case, to which the Commission thus refers, is that Congress can invade the privacy of a citizen, or authorize it to be invaded, only when the information sought concerns a subject matter of which Congress has jurisdiction. That case clearly holds that a general power does not exist in Congress or either House to make fruitless or intrusive inquiry into the private affairs of a citizen. That holding was reaffirmed in the case of *I. C. C.* v. *Brimson*, 154 U. S. 447, and in the *Chapman* case, 166 U. S. 661; and most recently in the *Tobacco Companies* case, which involved the right of corporations to protection against the Commission.

While the right of privacy must at times yield to governmental authority, any intrusion whatever by the Federal Government into the private affairs of a citizen not necessary in the exercise of some delegated or inherent power constitutes an unreasonable search and is clearly forbidden by the Fourth Amendment. This must be so

since, unless the search is necessary in the proper exercise of some power, it constitutes a mere prying into the private affairs of the citizen in order to satisfy governmental or public curiosity, the prevention of which was the fundamental purpose of the Fourth Amendment. A citizen may be compelled to disclose his private affairs when pertinent or relevant to some issue in a case being litigated in Court or before some governmental commission. He may likewise be compelled to make such disclosure before Congress or a Legislative Committee when pertinent to a subject with respect to which Congress has power to legislate. Unless referable to the exercise of governmental authority, whether legislative, judicial or administrative, within the proper field of jurisdiction of the legislative, judicial or administrative body, every search by an agency of the Federal Government into the private affairs of a citizen constitutes an unreasonable search under the Fourth Amendment. The primary purpose of that Amendment was not to protect the citizen against forcible or stealthy search or the disruption of his business by the conduct of a search, but to protect the highly prized right of privacy. In any case arising under the Fourth Amendment, therefore, the first requisite must be to determine the purpose of the inquiry. Protection against search clearly is the general rule and the right to search is the exception thereto.

We have referred above (page 5) to six different alleged purposes disclosed by the Answer and the Main Brief of the Commission as the cause of the demand for reports. Certain of those purposes are thus summarized in the Supplemental Brief for the Appellants (page 6):

> "The inquiry by the Commission originated from the fact that the attention of Congress was directed to high prices prevailing for certain basic commodities * * * and the House of Representatives, seeking the cause, called before one of its committees members of the Federal Trade Commission, who recommended inquiry into the conditions affecting costs and prices of these commodities, and Congress appropriated money for that purpose,

> with the idea that the information obtained might disclose influences affecting interstate commerce and form the basis for additional legislation, *or enable the Commission to take some action, or relieve the situation through publicity.*"

We do not admit that the Commission is entitled to call for information to

(1) "form the basis of additional legislation"; or

(2) "enable the Commission to take some action"; or

(3) "relieve the situation through publicity"; but it is clear that upon the Commission's own theory the Fourth Amendment would be violated unless the information sought were reasonably necessary for one of those purposes.

We have heretofore shown that the information desired cannot form the basis for any valid additional legislation. This case does not raise the question as to what information the Commission may properly require by means of reports. It is sufficient in this case to point out that the Appellees are not raising an academic question as to the power of Congress or the Commission to require reports, but are endeavoring to protect their right to keep private that information which the Commission has demanded. We have already indicated the character of that information and it is clear from the mere recital of the details called for by the Commission that the purpose of the Commission was primarily to secure the information as to costs, prices and profits, and have shown that Congress does not have power to regulate any of these three subjects.

Since Congress does not have power to regulate prices, costs or profits or any of the phases of production, it follows that the Commission, which is merely the creature of Congress, cannot have power to do so and the Act itself shows that Congress has not attempted to delegate to the Commission any right to exercise such power.

The third purpose suggested, namely, to enable the Commission to relieve the situation as to high prices

through publicity, implies that although the Commission cannot regulate prices or costs and although Congress cannot enact any regulation therefor, it can, by securing the required information and publishing it, exercise a regulatory power which it cannot exercise through legislation. If this be true then obviously there is no limit to the power of Congress directly or indirectly to make a general inquiry into the private affairs of a citizen and thus nullify the Fourth Amendment. Such a conception of the powers of Congress would be violative of the Fourth Amendment and directly opposed to the position taken by this Court in dealing with the attempt of the Commission to exercise similar powers in the *Tobacco Companies* and *Grain Companies* cases.

We cannot state more clearly or emphatically our own position on the fundamental principles involved in the case at bar than in the language of Mr. Justice FIELD in the case of

In re Pacific Railway Comm., 32 Fed. 241, 250:

> "The investigation directed is to be distinguished from the inquiries authorized upon taking the census. The constitution provides for an enumeration of the inhabitants of the states at regular periods, in order to furnish a basis for the apportionment of representatives, and, in connection with the ascertainment of the number of inhabitants, the act of congress provides for certain inquiries as to their age, birth, marriage, occupation, and respecting some other matters of general interest, and for a refusal of any one to answer them a small penalty is imposed. Rev. St. §2171. There is no attempt in such inquiries to pry into the private affairs and papers of any one, nor are the courts called upon to enforce answers to them. Similar inquiries usually accompany the taking of a census of every country, and are not deemed to encroach upon the rights of the citizen. And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may

inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. *In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.*

"*Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.* The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners."

After quoting from the case of

Boyd v. *U. S.*, 116 U. S. 616,

Mr. Justice FIELD continued:

"The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. *It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers,*

without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans. * * *

"Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord CAMDEN, said the supreme court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the Government, and its employes, of the sanctity of man's home and the privacies of life.' * * *

"This case (the *Kilbourn* case, *supra*) will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

In his concurring opinion Judge SAWYER said (p. 263):

"* * * *A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws;* and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

The point actually decided in the *Pacific Railway Commission* case was that the Court could not under the Con-

stitution use its power in enforcing the production of testimony before the commission there involved, as the matter was neither a "case" nor a "controversy". This has been said in the case of

In re Grouse, 78 Fed. 187,

to have been overruled by the *Brimson* case, *supra*, but the points there involved were different and in the *Brimson* case the Court quoted with approval the language of Mr. Justice FIELD. The underlying principle declared by Mr. Justice FIELD was later approved in the case of

Ellis v. *Int. Com. Comm.*, 237 U. S. 434,

in which the *Pacific Railway Commission*, *Brimson* and *Harriman* cases were cited together as authorities against "fishing expeditions."

The Court has sustained Congress in extending the powers of the Interstate Commerce Commission in investigating violations of law and in informing itself as to the *conduct and affairs of common carriers* in matters affecting interstate commerce, but even in so doing has protected the rights of carriers in their purely private affairs, such as correspondence, as in

U. S. v. *L. & N. Ry. Co.*, 236 U. S. 318.

In the *Tobacco Companies* and *Grain Companies* cases, *supra*, it has reaffirmed the underlying principles as to the rights of privacy of corporations even though engaged in interstate commerce. We cannot believe that it will now recognize the existence of a power "unparalleled in its vague extent" and authorize a subordinate agency of Congress "to sweep all our traditions into the fire" by the compulsory divulging of entirely private information and trade secrets regarding matters over which Congress has no legislative power and in the absence of even a shadow of suspicion of wrong doing and merely for the purpose of getting the information for publication.

The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the Appellants from the files should be affirmed.

Respectfully submitted,

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